(31,164)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 454

LEO A. PRICE, AS RECEIVER IN EQUITY OF J. M. GIDDING & CO., INC., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 21, 1925

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[fol. 1] **IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK**

No. E27-141

CHARLES H. MEARS, Complainant,

against

J. M. GIDDING & CO., INC., Defendant

JUDGMENT—Oct. 16, 1924

This cause having come on to be heard upon the objections and exceptions filed by Leo A. Price, as receiver of J. M. Gidding & Co., Inc., to the report of the Special Master filed herein on October 15, 1924, allowing the claim of the United States of America for income taxes and duties as a priority claim, and after hearing counsel, it is

Ordered and Decreed that the exceptions and objections filed to the report of the Special Master upon the claim of the United States of America be and the same hereby are overruled and the report of the said Special Master is hereby in all respects confirmed.

Further Ordered and Decreed that Leo A. Price, as receiver of J. M. Gidding & Co., Inc., be and he hereby is directed to pay out of the assets of the defendant in his hands, as priority claims, the claim of the United States of America for income taxes in the sum of $11,331.07 and the claim for duties in the sum of $1,086.70.

Dated, New York, October 16, 1924.

Francis A. Winslow, U. S. D. J.

[fol. 2] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPORT OF SPECIAL MASTER

Report of Wallace MacFarlane, Special Master

To the Judges of the District Court of the United States for the Southern District of New York:

Pursuant to an order of this court entered herein on the 14th day of March, 1924, wherein it was ordered that "Wallace MacFarlane be appointed special master to take testimony with respect to claims filed herein to which objection shall be taken by the receiver, and to report to this court his opinion and recommendations with reference thereto," I, the said special master, respectfully report as follows:

Appearances:

Messrs. Rosenberg & Ball (Godfrey Goldmark, Esq., of counsel) for the Receiver of J. M. Gidding & Company, Inc.

William Hayward, Esq., United States Attorney (Thomas J. Crawford, Esq., Assistant United States Attorney), for the Collector of Internal Revenue and Collector of Customs.

[fol. 3] The United States of America, through Charles W. Anderson, Collector of Internal Revenue for the Third New York District, filed a claim with the receiver of J. M. Gidding & Company, Inc., the defendant above named, in the amount of $16,912.29 for additional income taxes assessed against said company for the year 1920 (Ex. A). This tax was reduced on revision to $15,112.47
and was not assessed until after the appointment of the receiver (Exs. B & C).

For the fiscal year ending January 31, 1923, income tax was assessed against Gidding & Company in the sum of $6,299.82
On revision this tax was reduced to 2,518.42

Making an overassessment of 3,781.40

The receiver was appointed in this action on October 2, 1923. Prior to the appointment of the receiver Gidding & Company had paid ½ of the uncorrected tax for 1923 ..... $3,149.91
and the receiver on or about March 29, 1924, also before the reduction of the tax for 1923, paid the remaining half (Ex. E) 3,149.91

When the government reduced the tax for 1923 from $6,299.82 to $2,518.42, it credited the overassessment of 3,781.40

(Ex. D), already paid, as aforesaid, upon the unpaid taxes for 1920, leaving the net claim of the government for income taxes (Ex. C).... $11,331.07

For this amount, $11,331.07, the government claims a right to [fol. 4] priority of payment. The receiver admits the net amount of the claim as above stated, but disputes the right to priority.

If priority is denied, the government's claim for income taxes will, of course, be allowed as a general claim, and the amount will be adjusted rather differently. The government concedes the overpayment of $3,781.40 of income tax assessed against Gidding & Company for 1923. If the government's claim for the income tax of 1920 is entitled to priority, this overpayment is correctly treated as a payment on the gross amount of that tax reducing it to $11,331.07; but if the government is only a general creditor, then it is not entitled to apply this overpayment on the principal of its claim for income taxes for 1920, because, as a general creditor, it would be entitled to divi-

dends only, which the receiver claims will not exceed forty per cent and may be considerably less. It is agreed by the parties (M., pp. 3, 4) that this overpayment on the income tax of Gidding & Company for the year 1923 should be divided as follows:

Paid by Gidding & Company prior to the receivership..	$631.49
Paid by the receiver in 1924	3,149.91
	$3,781.40

The receiver, therefore, claims that if it is held that the government is only a general creditor for the income tax of 1920, that claim should be liquidated as follows:

Total tax as revised	$15,112.47
Less overpayment by Gidding & Company on tax of 1923	631.49
Making the net claim of the government as a general creditor	$14,480.98

[fol. 5] and that the receiver is entitled to retain as a setoff against this erroneous overpayment to the government of $3,149.91 by the receiver all dividends heretofore or hereafter declared upon a government claim of $14,480.98 until the estate has recouped the full amount of such overpayment by the receiver.

The receiver's opposition to the government's claim of priority rests on Equitable Trust Co. v. Conn. Brass & Mfg. Corp., 290 Fed. 712, and the interpretation in that case of U. S. R. S. 3466. That case did not involve a claim by the United States for taxes. This claim is for taxes and falls directly within the decision of Knox, D. J., in Liberty Ins. Co. v. Johnson Shipyards Corp., rendered on July 23, 1924, which, so far as the master is informed, has not yet been reported. On the authority of that decision I sustain the claim of the government to priority of payment, and liquidate its claim as follows:

Income tax for the year 1920.....	$11,331.07
For liquidated duties (M., p. 9).....	1,086.70
Total	$12,417.77

I return herewith:

(1) Stenographer's minutes, pp. 1-10.

(2) Exhibits A, B, C, D and E relating to the claim for arrears of income taxes, and Exhibits F, G, H, I and J relating to the undisputed claim for liquidated customs duties.

Dated October 15, 1924.

(Sd.) Wallace MacFarlane, Special Master.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Wallace MacFarlane, Esq., Special Master

MINUTES OF HEARING BEFORE SPECIAL MASTER

(Claim of United States of America)

Thursday, October 2nd, 1924—10:30.

Appearances:

Messrs. Rosenberg & Ball (Godfrey Goldmark, Esq., of Counsel), for the Receiver of J. M. Gidding & Company.

William Hayward, Esq., United States Attorney (by Thomas J. Crawford, Esq., Assistant United States Attorney, of Counsel), for the Collector of Internal Revenue and Collector of Customs.

Mr. Goldmark: The proof of claim for 1920 taxes, which I ask to be marked in evidence, was for $16,912.29, for income taxes for the year 1920. I produce the proof of claim, sworn to by the Collector of Internal Revenue March 21st, 1924,

Marked Receiver's Exhibit A.

Mr. Goldmark: I also offer original letter from the Treasury Department at Washington, dated May 15, 1924, addressed to J. M. Gidding & Company, from which it appears that the tax liability [fol. 7] for the year 1920 is, instead of the figures mentioned in the proof of claim, the sum of $15,112.47, and it also shows that there was an over assessment of $3,781.40 for the fiscal year January 31st, 1923, as shown in detail in an attached statement. Unless asked for, I will not put in the statement showing the details.

Mr. Crawford: That is not necessary. We concede the over assessment.

Letter refered to marked Receiver's Exhibit B.

Mr. Goldmark: I also offer the notice and demand for the tax received from the office of the Collector of Internal Revenue for the Third District showing the sum of $11,331.07 as the amount claimed to be due.

Mr. Crawford: No objection.

Notice and demand referred to marked Receiver's Exhibit C.

Mr. Goldmark: The original tax for 1923 was $6,299.82. The tax liability, as readjusted for that year, was only $2,518.42, so that there was an over assessment for the year 1923 of $3,781.40. I offer a communication from the Deputy Commissioner of Internal Revenue, being a certificate of over assessment which shows those facts:

Mr. Crawford: No objection.

Communication from the Deputy Commissioner of Internal Revenue referred to marked Receiver's Exhibit D.

Mr. Goldmark: Mr. Crawford, is it conceded that of the original assessment for 1923, amounting to $6,299.82, one-half of that sum,

to wit, $3,149.91, was paid by the defendant prior to the appointment of the Receiver, and that the balance, to wit, $3,149.91, was paid by the Receiver since his appointment?

Mr. Crawford: Advise me of the date of the appointment of the Receiver.

[fol. 8] Mr. Goldmark: October 2nd, 1923.

Mr. Crawford: I would rather state it this way: According to the information which I have received from the office of the Collector of Internal Revenue there was a payment on account of this 1923 tax made on April 20th, 1923, in the sum of $1,574.95, apparently representing one-quarter of the total amount, and another quarterly payment of $1,574.96 on June 17th, 1923. I am also informed that there was a payment made to the Collector of the Third District on June 11th, 1924; apparently it was made by the Receiver, of $3,149.91.

Mr. Goldmark: Now, Mr. Crawford, the fact then is, is it not, that there was an over assessment for 1923, and an over payment for 1923 of $3,781.40?

Mr. Crawford: Exactly. The amount of the over assessment represents the amount of the over payment.

Mr. Goldmark: And, therefore, as the Receiver paid $3,149.91, on that over payment, he paid that amount just mentioned, and the Gidding corporation itself paid the difference of $631.49?

Mr. Crawford: Yes, that is conceded.

Mr. Goldmark: The Receiver, therefore, contends that if the Government's claim is entitled to a priority, there must be deducted from the claim for the 1920 tax, in the sum of $15,112.47, the full over payment, making the priority claim $11,331.07. If, on the other hand, it is held that the Government claim is not entitled to priority, then the Receiver contends that there should be deducted from the $15,112.47 the amount paid by Gidding, to wit, $631.49, leaving a balance of $14,480.98, and that this is a general claim, and that [fol. 9] against any dividend payable upon that claim there must be deducted the Receiver's payment of $3,149.91.

I offer in evidence the check by which the Receiver paid the sum of $3,149.91, to be sent to the Master and marked when received Receiver's Exhibit E.

Mr. Crawford: No objection.

Check referred to marked Receiver's Exhibit E.

Mr. Goldmark: I offer in evidence the bill of complaint, the answer, and the order appointing the temporary receiver, and also the order of Judge Learned Hand, dated January blank—the date is omitted here—1924, appointing a permanent receiver herein. In this case an order was made directing the filing of claims with the Receiver on or before March 1st, 1924.

Mr. Crawford: I have no objection to the papers mentioned by Mr. Goldmark being deemed before the Special Master for the purposes of this claim. I do not see any necessity for their being marked as exhibits.

Mr. Goldmark: I want them put in the record.

Mr. Crawford: We will not question for a moment the regularity of the receivership proceedings in the equity receivership suit. Since Mr. Goldmark desires the papers to be put in, I have no objection to their being marked as exhibits.

Mr. Goldmark, I notice that the proof of claim which you have marked in evidence, covering the 1920 income tax in the larger amount before it was reduced, is sworn to on the 21st of March, 1924, apparently several weeks after the expiration of the time fixed by the order. You don't intend to make any point of that, do you?

Mr. Goldmark: I do not. I shall assume that the claim was [fol. 10] filed within the time specified, or that an order for filing nunc pro tunc was obtained.

This business was continued until the 7th of January by the temporary receiver, and on the 9th of January he was appointed permanent receiver. Thereupon the assets of the corporation were liquidated with the result that the net assets in the hands of the Receiver will be insufficient to pay all the allowed claims 100 per cent.

Mr. Crawford: I have no objection to your statement going on the record, but I ask Mr. Goldmark whether he is in a position to state whether at the time of the commencement of the suit the assets were sufficient to pay the creditors in full?

Mr. Goldmark: The bill of complaint alleges that if the assets were sold in the ordinary course of business that they would yield more than enough to pay the creditors. I am unable to state what a forced sale of the assets would have brought at the time of the Receivership.

Mr. Crawford: What was the nature of the assets?

Mr. Goldmark: A stock of Merchandise in four established and running dress shops in the city of New York, Philadelphia, Washington, Cincinnati and Duluth (perhaps that is five).

Mr. Crawford: You have no other information regarding the value of the assets as of the date of the commencement of the suit other than the statement in the bill of complaint. You said, I believe, that the bill of complaint contained an allegation that the assets were worth—

Mr. Goldmark: What do you mean by "value"?

Mr. Crawford: Market value.

Mr. Goldmark: I am unable to state the market value of the stock of merchandise in the five stores.

[fol. 11] Mr. Crawford: Did you have an appraisal made after the appointment of the Receiver?

Mr. Goldmark: We did not, as I remember it, but I believe there was an inventory.

Mr. Crawford: Do you know what the inventory values were?

Mr. Goldmark: The book values.

Mr. Crawford: Yes. Whatever the inventory values were, do you know what they were?

Mr. Goldmark: I do not know now. I will say this, there were attempts to reorganize this business, and those attempts failed, which resulted in a liquidation by the receivership.

Mr. Crawford: Is this receivership about to be closed?

Mr. Goldmark: This receivership cannot be closed until this and other disputed claims have been disposed of.

The Master: He is asking whether there is a probability of a speedy closing?

Mr. Crawford: Are you in a position now to state about what the amount of the general claims allowed will be and what dividends will be paid on general claims. I understand it is just your opinion.

Mr. Goldmark: If certain large claims pending before the Master are not allowed, the general creditors will receive approximately 40 per cent of the amount of their claims. If these claims pending before the Master are allowed to share in dividends, then the general creditors will probably not receive more than 30 per cent.

In addition to the foregoing claim, the United States has filed five claims for customs duties aggregating the sum, the amount of which is not in dispute, of $1,086.70. The receiver, however, contests [fol. 12] the Government's rights to priority. These proofs of claim are all in the same form. And I offer the five proofs of claims.

Mr. Crawford: No objection.

Claim for $605.90 marked Receiver's Exhibit F.

Claim for $64.95 marked Receiver's Exhibit G.

Claim for $15 marked Receiver's Exhibit H.

Claim for $120.50 marked Receiver's Exhibit I.

Claim for $280.35 marked Receiver's Exhibit J.

Mr. Goldmark: I claim, both as to taxes and duties, that the right of the United States to priority, if priority exists, must be a statutory right, and that there is no statute that prefers any claim of the United States, whether it be, what is technically called a tax, or what is ordinarily called a debt, except in the specific cases set forth in Section 3466 of the Revised Statutes of the United States, none of which cases includes a suit such as this. I claim as a matter of fact, that the word "debt" in Section 3466 of the Revised Statutes, having in mind its history, includes both taxes, duties, and ordinary contractual debts due the United States of America, and, therefore, as Section 3466 is not applicable, there is no right of priority for taxes, as above stated, and I claim that there is no inherent right of priority in the Federal Government for the payment of taxes based on rights of sovereignty.

(Briefs to be exchanged and submitted.)

[fol. 13] IN UNITED STATES DISTRICT COURT

EXHIBIT A IN EVIDENCE

[Title omitted]

Settlement of Claim for Taxes Due the United States

Comes Charles W. Anderson, Collector of Internal Revenue for the Third Collection District of New York, a duly authorized agent for

the United States in this behalf, and says that J. M. Gidding & Co., Receivership, is justly and truly indebted to the United States of America for Internal Revenues Taxes as follows:

Nature of tax and statute involved (Give Section or Sections): Income Rev. Act of 1918.

Year or taxable period ended 1920.

Amount of Tax: 16,912.29, together with interest at 1% per month until Interest began.

That no part of said taxes or interest has been paid but that the same are now due and payable at the office of said Collector of In-[fol. 14] ternal Revenue at 250 W. 57th St., New York City, New York.

That no security therefore is held by the United States and that there are no set-offs or counterclaims.

That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being fully determined by Section 3466 of the Revised Statutes and Section 64 (a) of the Bankruptcy Act.

And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Dated this 21st day of March, 1924.

Charles W. Anderson, Collector of Internal Revenue for the Third Collection District of New York.

Sworn to and subscribed before me this 21st day of March, 1924. Ruth Raber, Dep. Coll.

[fol. 15] [Title omitted]

Proof of Unsecured Preferred Debt Due U. S. Government

724 Fifth Ave., N. Y.

Charles W. Anderson, Collector of Internal Revenue, 3rd District of N. Y., 250 West 57th Street, New York, N. Y., to Leo A. Price, Temporary Receiver, Rosenberg & Ball, Solicitors for Receiver, 74 Broadway, New York:

[fol. 16] U. S. of America,
State & County of N. Y.,
Southern Dist. of N. Y., ss:

—— ——, being duly sworn, says: He is over 18 years of age and resides at ——. On —— —, ——, he served a Claim of which

within is a copy, on —— —— in the within entitled proceeding by delivering the Claim to and leaving it with him, delivering the Claim and leaving it with —— ——, the person in charge of his office (he being absent therefrom at the time), depositing the Claim in a securely sealed postpaid wrapper addressed to him at his office No. —, in said County.

Deponent knows the person so served to be the official designated as aforesaid.

—— ——.

Sworn to before me this — day of ——, 192-. —— ——.

———

[fol. 17] IN UNITED STATES DISTRICT COURT

EXHIBIT B IN EVIDENCE

Treasury Department, Washington

(Emblem)

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT: CA-2112-3-App.

May 15, 1924.

J. M. Gidding Company, 564-5th Avenue, New York, N. Y.

SIRS: An examination of your income tax returns and of your books of account and records for the fiscal years ended January 31, 1920, to January 31, 1923, discloses an additional tax liability for the fiscal year ended January 31, 1920, amounting to $15,112.47 and an overassessment of $3,781.40, for the fiscal year ended January 31, 1923, as shown in detail, in the attached statement.

You are advised that in order that the collection of this tax may not be jeopardized by the delay incident to the giving of the usual thirty day notice as provided for in Section 250 (d) of the Revenue Act of 1921, an immediate assessment by the Commissioner of Internal Revenue will be made.

The Bureau will however, entertain a claim in abatement if filed [fol. 18] within ten days of receipt of notice and demand from the Collector of Internal Revenue for your district in accordance with the provisions of Article 1006 of Regulations 62.

An appeal covering the basis of the claim should be filed setting forth in full all information upon which you base your protest against the assessment shown in this letter. This appeal should be filed in triplicate and should be addressed to the Commissioner of Internal Revenue for the specific attention of IT:CA-2112-3-App. On request a conference will be arranged prior to a final decision.

If an appeal is not filed payment should be made upon receipt of notice and demand from the Collector of Internal Revenue for your district.

Respectfully, J. G. Bright, Deputy Commissioner, by F. R. Clute, Head of Division.

Enclosure: Statement.

[fol. 19] IN UNITED STATES DISTRICT COURT

EXHIBIT C IN EVIDENCE

Income, War-profits, and Excess-profits Tax

Notice and Demand for Tax

Form 7658

United States Internal Revenue Service

Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within ten days after date of this notice, the Act provides that a penalty of 5 per cent of the amount of tax due will be added, plus interest at the rate of 1 per cent per month, from Jun. 24, 1924, until paid.

Date Jun. 24, 1924.

Name and address: Gidding Co., J. M., 724 5th Ave., New York, N. Y.,

May 00 SPL, 4.

Return this form with remittance.

9. 10284.

To avoid penalty and interest this tax must be paid to the Collector of Internal Revenue at 250 W. 57th St., N. Y. C., not later than Jul. 5, 1924.

Collector's paid Stamp.

Date: —— —, ——.

To the Collector of Internal Revenue:

I inclose herewith the sum of $— in payment of the tax shown below.

Name: —— ——. Address: ——.

Items: 1/31/1920 Fisc OL 5/15/24 NC 250 D.

Total assessment: 11,331.07.

Stamped across the above form of letter was the following: Important. This bill with remittance must be returned to Collector of Internal Revenue 3rd District of New York, Fisk Bldg., B'way & 57th St., N. Y. City.

[fol. 20] IN UNITED STATES DISTRICT COURT

EXHIBIT D IN EVIDENCE

Treasury Department

Office of Commissioner of Internal Revenue, Washington

(Emblem)

Income Tax Unit IT:R:CC.

Certificate of Overassessment

Number: 663894. Allowed: $3,781.40. Schedule No. 10284

J. M. Gidding Company, 724 Fifth Avenue, New York, New York.

SIRS: An audit of your income tax return, form 1120 and a consideration of all the claims (if any) filed by you for the fiscal year ended January 31, 1923, indicates that the tax assessed for this year was in excess of the amount due:

Original tax, 1923 List, Account #412114	$6,299.82
Tax liability	2,518.42
Overassessment	$3,781.40

The audit as made has been approved by this office.

The amount of the overassessment will be abated, credited, or re-[fol. 21] funded as indicated below. (You will be relieved from the payment of any amount abated: if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Respectfully, J. G. Bright, Deputy Commissioner, by F. R. Clute, Head of Division.

Abated: $3,149.91. May 1924, Trans. L.
Credited: $631.49. May 00 Sp 4 Wash 1924 L.
Year: ——.
Account No.: ——.
Instructions executed.

(Signature) Charles W. Rudeady, Collector Int. Rev., 3rd District of New York.

Refunded: $—.

(7776) Revised July, 1923. Government Printing Office 2—11665.

[fol. 22] IN UNITED STATES DISTRICT COURT

EXHIBIT E IN EVIDENCE

Guaranty Trust Company of New York, Fifth Avenue Office

1-107

No. 68. New York, 3/29, 1924.

Pay to the Order of Collector of Internal Revenue Three Thousand One Hundred Forty Nine Dollars Ninety One Cents.

Payable through the New York Clearing House.

J. M. Gidding & Co., Inc. Leo A. Price, Receiver.

$3,149.91.

Endorsements: Collector of Internal Revenue, 2nd Dist., New York, Received 9 Apr. 1/24. Collector of Internal Revenue, 3rd Dist., New York, Received Apr. 3/24. Pay to Federal Reserve Bank—April 8th, 1924—Charles W. Anderson, Collector of Internal Revenue. Fisk Building, Broadway & 58th St., N. Y. C. Federal Reserve Bank of New York—Received Payment Apr. 10/24.

[fol. 23] IN UNITED STATES DISTRICT COURT

EXHIBIT F IN EVIDENCE

SJK. Preferred.

[Title omitted]

Proof of Claim for Duties

At the City of New York in the said Southern District of New York, on the 5th day of August, 1924, came Walter R. Eaton, an Acting Deputy Collector of Customs in the office of the Collector of Customs of the Port of New York, and made oath and said that J. M. Gidding Co., Inc., against whom a petition in bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to the United States of America as a preferred claimant by virtue of the provisions of Section 64a of the Bankruptcy Act in the sum of Six Hundred and Five Dollars and Ninety Cents ($605.90), representing balance of duties due on Entry No. 304472 covering an importation of model hats ex SS. Paris, July 25, 1921.

That no part of said claim has been paid; that there are no set-offs or counterclaims to the same, and neither the said Collector of Customs nor deponent nor any person by their order or to the knowledge

[fol. 24] or belief of deponent has had or received any manner of security whatsoever.

Walter R. Eaton, Acting Deputy Collector of Customs Port of New York.

Subscribed and sworn to before me this 5th day of August, 1924. Samuel J. Katzberg, Commissioner of Deeds, City of N. Y. (Seal.)

It is stipulated that Exhibits G to J inclusive are respectively in the same form as the foregoing exhibit.

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT

To the District Court of the United States for the Southern District of New York:

Charles H. Mears, a citizen and resident of the State of Pennsylvania, brings this, his Bill of Complaint, on his behalf and on behalf of all the creditors of J. M. Gidding & Co., a corporation duly organized and existing under and by virtue of the laws of the State of New York and a citizen of said State, and thereupon alleges as follows:

First. The complainant is a citizen of the State of Pennsylvania and a resident of said state, residing at Philadelphia therein.

Second. That upon information and belief, the defendant is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, and is a citizen of said State, and has its principal office and place of business in the Borough of Manhattan, City of New York, and Southern District of New York.

Third. Upon information and belief, defendant is engaged in the business of importing and selling at retail wearing apparel for Women. Defendant has branch stores at Cincinnati, O., Duluth, [fol. 26] Minn., Philadelphia, Pa., and Washington, D. C.

Fourth. The assets of the defendant consist of merchandise, moneys in bank, accounts receivable, furniture and fixtures. Defendant has a large stock of merchandise and other assets in the Borough of Manhattan, City of New York, within the jurisdiction of this Court.

Fifth. On information and belief, the defendant is indebted to the complainant for the sum of $10,000 upon the prommissory note of the defendant heretofore made and delivered, wherein for value received, the defendant promised to pay to its own order three months from date, the sum of $10,000. Defendant thereupon

endorsed said note in blank and delivered said note, for value, and the complainant is now the owner and holder of said note. Said note was not paid at its maturity. All holders of said note prior to complainant at all times herein mentioned, were and now are citizens and residents of the State of Pennsylvania and could have prosecuted this suit in this court if no assignment or transfer of said note had been made.

Sixth. Upon information and belief, defendant is indebted to the complainant and other creditors in a sum in excess of $1,500,000. Of said sum, the defendant is indebted to various banks in the sum of approximately $500,000.

Seventh. Upon information and belief, the defendant is at the present time without funds sufficient to meet its present obligations or its obligations due or shortly to mature, although complainant is [fol. 27] informed and believes, and therefore alleges, that if the assets of the defendant, particularly its large stock of merchandise, can be sold or liquidated in the usual and ordinary course of defendant's business and under management, that its assets will be largely in excess of its lawful obligations. Upon information and belief, defendant has quick assets of a value nearly equal to the amount of its liabilities, and, in addition, has other slow assets of approximately $1,000,000.

Eighth. Upon information and belief, certain of the creditors of the defendant are pressing their claims for payment, and are endeavoring in various ways to enforce their respective claims, and certain creditors have already commenced suit against defendant to enforce their claims. If the assets of the defendant are given no protection, there may not be enough to pay all creditors, should the assets be abandoned to the general waste of separate legal proceedings. Complainant further alleges that further actions on the part of the creditors of the defendant will result in judgments, attachments, executions and seizures by sheriffs and other like officers, and force piecemeal sales of the property and assets of the defendant, with the necessary consequences, that the defendant will be hampered in the operation of its business, and complainant will sustain irreparable injury.

Ninth. Complainant is informed and believes that if the defendant's assets are not taken into judicial custody, actions at law may be instituted by some of the creditors, who are pressing for paying of their claims, and through such actions such creditors may obtain judgments and executions, and inequitable preference as against the [fol. 28] complainant and other creditors of the defendant might result and the assets may not be enough to pay all the creditors of defendant. Likewise, unless assets of the defendant are administered by a Court of Equity and all actions and proceedings of law, including executions, attachments and other proceedings enjoined, the complainant feels that the defendant will be subjected to litigations which will result in an interruption of its business and a consequent serious dissipation of its assets.

Tenth. That in order that the property of the defendant may be preserved for equitable distribution among those entitled thereto, the complainant believes that this Honorable Court should intervene and appoint a receiver to take charge of all of the needs of the defendant who shall conduct, manage and administer the same under the power to be conferred upon him in the proposed decree herewith submitted.

Eleventh. The complainant shows that the amount of the controversy in this action is in excess of Three Thousand Dollars ($3,000) exclusive of interest and costs.

Inasmuch, therefore, the complainant has no adequate remedy at law and can have relief only in equity, the complainant files this bill of complaint on behalf of itself and other creditors of the defendant who may hereafter join herein and prays for equitable relief as follows:

1. That this Honorable Court will administer all the properties, assets and effects, rights and business belonging to the defendant and will adjudicate, enforce, adjust and determine the rights, equities [fol. 29] and claims of all the creditors of the defendant, including the claim of the complaint.

2. That this Honorable Court will forthwith appoint a receiver or receivers of all and singular the property of the defendant, of whatsoever nature, with full power to take into their possession, hold and manage the same under the direction of this Court, with such powers as this Court may from time to time grant; to continue the business, in his discretion, to bring suit for, collect, receive and take into their possession all the property and assets of defendant, including books, records, vouchers, checks, moneys, real estate and all other property, real, personal and mixed; to institute, prosecute, become parties to, intervene in, compromise or defend any actions at law or in equity or under any statute for the recovery, protection and maintenance of any of the assets or properties of defendant, as they may deem necessary or proper, including the institution and prosecution of any such ancillary proceedings as they may deem advisable; to settle, collect, compound, adjust or make allowance upon any debt that may be due or owing to the defendant as they may deem proper; to pay any such claims or wages, or otherwise, as may have priority; and in general, with all the usual powers of receivers in such cases.

3. That the officers, managers, employees, creditors and stockholders of the defendant and all other persons, firms and corporations be required forthwith to transfer, convey and deliver up to such receiver or receivers possession of all property of the defendant, wheresoever situate.

4. That all persons, firms and corporations, be enjoined from in- [fol. 30] stituting, commencing, prosecuting or continuing the prosecution of any actions, suits, or proceedings at law or in equity, or under any statute against defendant, or from levying, or serving any attachments or executions or other processes upon the defendant

or upon or against any of the property of the said defendant, save and except the filing of mechanic's or other statutory liens, and generally that all persons, firms and corporations be enjoined from doing any act to interfere with said receivers in their possession of the property of defendant.

5. That a Writ of Injunction issue out of and under the seal of this Honorable Court or issue by one of your Honors, directing, enjoining, and restraining defendant and its officers, directors, agents and employees, and all other persons whatsoever from interfering with, transferring, selling or disposing of any of the property of said defendant.

6. That this Honorable Court will grant a Writ of Subpœna under the seal of this Honorable Court, directed to defendant, and commanding it on a date certain therein named, before this Honorable Court, to answer (but not under oath, answer by oath being expressly waived), all and any of premises, and to stand by, perform, and abide by such orders and decrees as may be made by this Honorable Court.

7. That a decree appoint a receiver or receivers of the property of the defendant and granting the relief prayed for in this bill of complaint may be granted by this Honorable Court in the form herewith submitted.

8. That at such time as may be found just and proper the prop-
[fol. 31] erties of the defendant may be ordered to be sold, in whole, or in part, for cash or on credit, in such manner and upon such terms and conditions as this Court may deem just and equitable, and that any such decree of sale shall make proper and equitable provision for the preservation of all equities, rights, properties, claims and liens of all creditors and shall provide for the sale of the property of the defendant subject to or free of liens and encumbrances, in whole or in part, as this Court may direct, and that the proceeds of any such sale be distributed among those entitled thereto, as this Honorable Court shall adjudicate, or that the properties of the defendant, in whole or in part, may be returned to it; and that the complainant may have such other and further relief in the premises as may be just and equitable, and that the defendant may be directed to make such bills of sale, assignments, transfers and conveyances of any such property as may be directed to be sold by this Court.

9. That such order shall be made by this Honorable Court, as to the service of this Bill of Complaint, and of any order that may be made in this suit as may be deemed sufficient and proper by this Court.

10. That the complainant may have such other and further relief as may be just and proper.

And the complainant will ever pray.

Rosenberg & Ball, Solicitors for Complainant, 74 Broadway, New York City. Wilbur L. Ball, of Counsel.

[fol. 32] Sworn to by Wilbur L. Ball. Jurat omitted in printing.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

J. M. Gidding & Co., Inc., the defendant in this cause, for answer to the Bill of Complaint, says:

First. That the defendant admits all of the allegations in said Bill of Complaint.

Second. That defendant joins in the prayer of said Bill of Complaint.

J. M. Gidding & Co., Inc., Defendant. Rose & Paskus, Solicitors for Defendant.

Sworn to by Nathaniel Gidding; jurat omitted in printing.

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPOINTING TEMPORARY RECEIVER

And now, on the 2nd day of October, 1923, this cause came on to be heard upon the Bill of Complaint duly filed herein and the answer of the defendant hereto this day likewise filed, and upon a motion of the complainant for the appointment of a receiver or receivers, and after due deliberation, it was, on motion of Rosenberg & Ball, solicitors for complainant,

Ordered, Adjudged and Decreed, that the complainant is upon the facts contained in said bill, and upon said answer, entitled to the relief prayed for in the complaint and herein granted, and it was further

Ordered, Adjudged and Decreed as follows:

That until the meeting of creditors hereinafter provided, Leo A. Price, Esq., be and he hereby is appointed temporary receiver of the above named defendant, and all of the property, assets and effects of said defendant, or in which the said defendant has any ownership or interest, whether such property be real, personal and mixed, and of whatsoever kind and description, and wheresoever situated, and all office furniture, fixtures, books of account, records and other [fol. 35] books, papers and accounts, cash on hand or in bank or on deposit, things in action, credits, stocks, bonds, securities, shares of stock, notes or bills receivable, muniments of title, as well as all other property of every character and description whatsoever of the defendant, and it was further

Ordered, Adjudged and Decreed, that the said Receiver be and he hereby is authorized forthwith to take possession and control and custody of all said property, assets and effects of said defendant; that said Receiver is authorized to continue the business of the defendant until the creditors meeting hereinafter provided, and to do all and any things and enter into all or any agreements as may be deemed by them necessary or advisable for such continuance of business, or to preserve and protect the said property or assets, and to employ and discharge and fix the compensation of such managers, agents and employees as may, in his discretion, be necessary or advisable in the administration of this estate; to employ accountants and counsel, and to make such payments and disbursements as may be needful or proper in the preservation of the assets of the defendant and the continuance of such business.

Said Receiver is further authorized and empowered to institute, prosecute, defend, compromise, adjust, intervene in or become party to such suits, actions or proceedings at law or in equity, including ancillary proceedings in state or federal courts, as may in his judgment be necessary or proper for the collection and preservation of the assets of the defendant or the carrying out of the terms of this decree, and likewise to defend, compromise or adjust, or otherwise dispose of all or any suits, actions or proceedings instituted against [fol. 36] him as Receiver or against the above named defendant, and also to appear in and conduct the prosecution or defense of any suit, or adjust or compromise any actions or proceedings now pending in any court by or against the said defendant where such prosecution, compromise, defense or other disposition of such suit or action will, in the judgment of said Receiver, be advisable or proper for the protection of the assets of the above named defendant, and such Receiver is authorized to settle with, compromise, collect from or make allowance to debtors of the defendant as he, the said Receiver, may deem advisable; and generally said Receiver is authorized to do all acts, enter into any agreements and accept, adopt or abandon any or all contracts as may be deemed by such Receiver advisable for the protection or preservation of the assets of the above named defendant, and it was further

Ordered, Adjudged and Decreed, that the bond of said Receiver, in the sum of Thirty Thousand Dollars, conditioned that he will well and truly perform the duties of his office and duly account for all moneys and property which come into his hands and abide by and perform all things which he shall be directed to do, with sufficient sureties to be approved by a Judge of this Court, be filed with the Clerk of this Court within two days from the date of this order, and it was further

Ordered, Adjudged and Decreed, that said defendant and each and every of its officers, directors, agents and employees, and all other persons claiming to act by, through or under or for said defendant, and all other persons, firms and corporations, including creditors [fol. 37] and stockholders of the defendant, and including all sheriffs, marshals, constables, and their agents and deputies and all other officers are hereby enjoined from transferring, removing, disposing of

or attempting, in any way, to remove, transfer or dispose of or in any way interfere with any of the properties owned by or in the possession of said defendant and all said persons, firms and corporations are enjoined from doing any act whatsoever to interfere with the possession and management by said Receiver of the properties of the defendant or in any way to interfere with the said Receiver in the discharge of his duties, or to interfere in any way with the administration and disposition in this suit of the affairs and properties of the defendant, and all creditors and stockholders of the said defendant are hereby enjoined from instituting or prosecuting or continuing the prosecution of any pending actions, suits, or proceedings at law or in equity, or under any statute, against the said defendant, and from levying any attachments, executions, or other process, upon or against any of the properties of said defendant, or from taking or attempting to take into their possession any of the properties of said defendant, and from issuing or causing the execution or issuance out of any court of any writ, process, summons, subpœna, replevin or attachment, and it was further

Ordered, Adjudged and Decreed, that the said temporary receiver shall cause ten days' notice to be given by mail to all known creditors of the defendant of a meeting to be held before the undersigned Judge of this Court, in Court room No. Three, on the 12th floor of the Woolworth Building, 233 Broadway, Borough of Manhattan, City of New York, within twenty (20) days from the date hereof, [fol. 38] at which meeting the court will entertain and consider such applications as may be made with reference to the further continuance of the business and the continuance of the receivership and who shall be the permanent receiver and make such orders in respect thereof as to the court may seem just and proper.

Dated, New York, October 2nd, 1923.

Learned Hand, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPOINTING PERMANENT RECEIVER

A decree having been made herein on October 2nd, 1923, appointing Leo A. Price as temporary receiver of the above-named defendant until a meeting of the creditors of said defendant to be held on October 18th, 1923, and said meeting having been duly held and a decree having been made herein on October 18th, 1923, continuing the said Leo A. Price as temporary receiver of the defendant for a further period of thirty days from said date, and a [fol. 39] decree having been made herein on November 15th continuing the said Leo A. Price as temporary receiver of the defendant for a further period of sixty days from said date, and this cause further having come on to be heard and the Court being fully advised in the premises, it is

Ordered, Adjudged and Decreed that Leo A. Price, Esq., the temporary receiver herein, be and he hereby is continued and appointed permanent receiver of the above-named defendant, and all of the property, assets and effects of said defendant, or in which the said defendant has any ownership or interest, whether such property be real, personal and mixed, and of whatsoever kind and description, and wheresoever situated, and all office furniture, fixtures, books of account, records and other books, papers and accounts, cash on hand or in bank or on deposit, things in action, credits, stocks, bonds, securities, shares of stock, notes or bills receivable, muniments of title, as well as all other property of every character and description whatsoever of the defendant; and it is further

Ordered, Adjudged and Decreed that the said permanent receiver shall have each and all of the powers heretofore vested in him as temporary receiver herein by the said decree of October 2, 1923; and it is further

Ordered, Adjudged and Decreed that said receiver is hereby authorized to continue the business of the defendant as provided in the said decree of October 2nd until February 1st, 1924, unless the said receiver, in his discretion, shall determine to cease the continuance of such business prior thereto; and it is further

Ordered, Adjudged and Decreed that the bond of the said tem-
[fol. 40] porary receiver in the sum of $30,000 heretofore filed be and the same is hereby continued as the bond of the said permanent receiver.

Dated, New York, January 9, 1924.

Learned Hand, U. S. D. J.

Consented to: Rose & Paskus, Solicitors for Defendant. Feiner, Maass & Skutch, Solicitors for Oliver W. Birkhead, as Chairman of Creditors' Committee. Rosenberg & Ball, Solicitors for Complainant and Receiver.

IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS TO REPORT OF SPECIAL MASTER

Leo A. Price, as receiver of J. M. Gidding & Co., Inc., by Rosenberg & Ball, his solicitors, respectfully takes the following exceptions [fol. 41] to the report of the Hon. Wallace Macfarlane, Special Master, filed in the office of the Clerk of this Court on October 15, 1924.

The receiver excepts to the conclusion of the Master:

(a) That the claim of the United States for income taxes for the year 1920 is entitled to priority in payment from the assets of the defendant;

(b) That the claim of the United States for duties is entitled to priority in payment from the assets of the defendant;

(c) To the failure of the Master to find that the United States is only a general creditor of the defendant in the sum of $14,480.98 for income taxes;

(d) To the failure of the Master to find that the United States of America is only a general creditor of the defendant for duties in the sum of $1,086.70;

(e) To the failure of the Master to find that against the general claim of the United States of America for taxes in the said sum of $14,580.98, there is to be offset against any dividends payable upon that claim, the receiver's payment to the United States of America of $3,149.91.

Dated, New York, October 15, 1924.

Rosenberg & Ball, Solicitors for Leo A. Price, Receiver, Office & P. O. Address, #74 Broadway, New York City.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL

To the United States District Court for the Southern District of New York:

Leo A. Price, as receiver of J. M. Gidding & Co., Inc., appointed in the above-entitled cause, respectfully shows that on October 16, 1924, an order was made in the United States District Court for the Southern District of New York, confirming the report of Wallace Macfarlane, Esq., Special Master, allowing the claim of the United States of America for income taxes for the year 1920 and its claim for duties as a priority claim to be paid out of the assets of the defendant.

The said Leo A. Price, as receiver aforesaid, the petitioner herein, deeming himself aggrieved by the said final decree, hereby appeals from said decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors filed herewith.

And your petitioner prays that he may be allowed an appeal in said cause and that a transcript of the record, proceedings and papers [fol. 43] upon which said final decree was made, duly authenticated, may be sent to the said Circuit Court of Appeals.

Dated, New York, October 16, 1924.

Rosenberg & Ball, Attorneys for Leo A. Price, as Receiver of J. M. Gidding & Co., Inc.

Office & P. O. Address, #74 Broadway, New York City.

It is ordered that the appeal, as above prayed for, be allowed.

Francis A. Winslow, D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Leo A. Price, as Receiver of J. M. Gidding & Co., Inc., by Rosenberg & Ball, his solicitors, assigns the following errors of the District Court upon his appeal to the Circuit Court of Appeals for the Second [fol. 44] Circuit from the order of the said District Court, dated October 16, 1924.

(1) The District Court erred in confirming the opinion of the Special Master allowing the claims of the United States of America as priority claims;

(2) The District Court erred in holding that the United States of America was entitled to priority in the payment of its said claims over the claims of the general creditors of the defendant corporation.

(3) The District Court erred in directing the receiver herein to pay in full the claims of the United States of America in the respective sums of $11,331.07 and $1,086.70.

Dated, New York, October 16, 1924.

Rosenberg & Ball, Attorneys for Leo A. Price, as Receiver, Appellant.

O. & P. O. Address, #74 Broadway, Borough of Manhattan, New York City.

[fol. 45] CITATION—In usual form; omitted in printing

[fol. 46] In United States Circuit Court of Appeals for the Second Circuit

Charles H. Mears, Complainant,

against

J. M. Gidding & Co., Inc., Defendant

Leo A. Price, Receiver, Appellant,

against

United States of America, Appellee

Stipulation re Transcript of Record

It is Hereby Stipulated and Agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter, as agreed upon by the parties to this appeal.

Dated, New York, October 31, 1924.

Rosenberg & Ball, Solicitors for Appellant. Wm. Hayward, United States Attorney, Solicitor for Appellee.

[fol. 47] In United States District Court

Charles H. Mears, Complainant,

against

J. M. Gidding & Co., Inc., Defendant

Leo A. Price, Receiver, Appellant,

against

United States of America, Appellee

Clerk's Certificate

I, Alexander, Gilchrist, Jr., Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereto affixed at the City of New York in the Southern District of New York, this 31st day of October, in the year of Our Lord One Thousand Nine Hundred Twenty-four, and of the Independence of the United States the One Hundred Forty-ninth.

Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 48] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES H. MEARS, Complainant,

against

J. M. GIDDING & CO., INC., Defendant

LEO A. PRICE, as Receiver, Appellant,

against

UNITED STATES OF AMERICA, Appellee

Before Rogers, Manton, and Hand, Circuit Judges

Rosenberg & Ball, for Appellant, Leo A. Price, as Receiver, Godfrey Goldmark, of Counsel.

William Hayward, United States Attorney for the Southern District of New York, for Appellee; Thomas J. Crawford, Assistant U. S. Attorney; John Holley Clark, Jr., Assistant U. S. Attorney, of Counsel.

OPINION

This cause comes here from the United States District Court for the Southern District of New York.

PER CURIAM:

The only question presented for review by this Court is whether or not the Government of the United States is entitled to the prior [fol. 49] payment of its claim for income taxes and duties as priority claims in an equity receivership. The Special Master reported that the United States was entitled to priority of payment, and the District Court on October 16, 1924, entered an order confirming the Master's report. Thereupon the case was brought here on appeal.

The question thus raised is not different from that considered by this Court in Liberty Mutual Insurance Company v. Johnson Shipyards Corporation in which an opinion has this day been filed. In accordance with that opinion, and for the reasons therein stated,

The order is affirmed.

[fols. 50 & 51] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the District Court of the United States for the Southern District of New York

JUDGMENT—Filed May 1, 1923

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R., M. T. M.

[File endorsement omitted.]

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 51 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Charles H. Mears, Plaintiff, against J. M. Gidding & Company, Inc., Defendant; Leo A. Price, as Receiver, etc., Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of May in the year of our Lord One Thousand Nine Hundred and twenty five and of the Independence of the said United States the One Hundred and forty ninth.

Wm. Parkin, Clerk. (Seal of the United States Circuit Court of Appeals, Second Circuit.)

[fol. 53] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.